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for Latin America

Observations on Latin America's Criminal Procedures Reforms: Lessons from the Past Two Decades

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Beginning in the mid 1980s and continuing to this day, the countries of the Latin American region have been engaged in a process of judicial reform, aimed at strengthening the capacities and performance of their judiciaries and other sector institutions and thus improving the services they provide to all citizens. While the reforms have multiple objectives and activities, the transformation of the criminal justice system and the substitution of more accusatory procedures for the former inquisitorial practices have been a principal element in all of them. Nearly all of the region's nations began their reform process here, and in many it has continued to be the focus of most efforts. Given the multiple problems afflicting their justice systems, criminal procedural reform might not seem the most appropriate starting point, and there are also, as discussed below, questions as to whether this strategic choice undermined its chances of success by diverting attention from other areas. However, politically the emphasis was nearly inevitable given the historical and contextual setting:

- Most of the region's countries were emerging from a period of de facto regimes in which the justice system, and the criminal justice system in particular, had been used and abused to combat opposition forces and repress social and political protest.
- There was a small constituency of jurists who had been advocating such changes for some time and was prepared, new codes in hand, to take them forward.
- External allies, and especially donors like USAID, were similarly concerned about the human rights abuses under the former regimes, and also sought to bring the perpetrators to justice.
- Although not affecting the earliest programs, the region was soon to experience an increase in criminal activity and thus citizen demands for more effective action against it. (To the extent this activity was linked to drug trafficking, the U.S Government interest was also strengthened).

With external support (and especially that of USAID) the movement began in Central America, but worked with the collaboration of a network of Latin American jurists from other countries and especially Argentina. US support to ILANUD (the United Nations Latin American Institute for the Prevention of Crime and Treatment of the Delinquent) was especially instrumental. This small organization, headquartered in Costa Rica, saw its budget increased ten-fold, allowing it to sponsor regional and subregional meetings on the code reforms as well as provide technical assistance to countries adopting the programs. Although Costa Rica would not adopt the entire reform package until 1996, it had made partial reforms in the 1970s and moreover had a judicial system acknowledged to be among the most honest and effective in the region and which had made notable advances

[1] The opinions expressed here are those of the author and do not in any way reflect the official position of the World Bank (which in any case does not work on criminal justice reform).

in the development of an independent public defense and prosecution.[2] Costa Rica is also the seat of the Inter-American Human Rights Court and thus has benefited from exchanges with members of that body.

The movement eventually would spread to South America and to Mexico so that by the present day, nearly all of the region's countries have adopted new codes and taken further steps to ensure their implementation.

Table I: Countries Enacting New Criminal Procedures Codes

Country	Date Enacted	Comments
Argentina	1991 (federal)	Leaves instructional judges but adds public ministry. First "modern" provincial code in Cordoba (1939) was revised in 1998. Several provinces (Mendoza, Buenos Aires) have enacted others since then.
Bolivia	1999	Went into effect May, 2001 although some elements (alternative sentencing, new statutes of limitations) were introduced a year earlier
Chile	2000	Incremental implementation by region through 2006
Colombia	1991, 2000, 2004	Last code, said to improve on others, to be incrementally incremented by region from 2005 through 2008.
Costa Rica	1973, 1996	Second code replaces 1973 modern-mixed system which kept *juez de instrucción.* New code entered effect for all cases in 1998
Dominican Republic	2002	Entered effect September 2004 for new cases and appeals of those already initiated
Ecuador	2000	Entered effect in mid 2001
El Salvador	December, 1996	Went into effect in April, 1998 for all new filings. Eliminated juries that had existed under prior code
Guatemala	1992	Went into effect in 1994 for all new cases, but lack of attention to institutional capacity delayed effective implementation
Honduras		Entered effect in February 2002.
Mexico	2005- 2006 for several states	New federal code still not enacted as of 2007, but several states have anticipated the change. Information of implementation is scarce.
Nicaragua		Entered effect December, 2003
Panama	1995	Modified a process that was already fairly accusatory
Paraguay	1999	Went into effect in March 2002. Subsequent modifications include the addition of a judge for the "intermediate stage" charged with deciding whether a case will go to trial. It is likely this addition will be reversed.
Peru	2004	A new code had been under partial implementation from 1990, but the version enacted in 2004 had been completely redrafted and is being implemented region by region.
Venezuela	January 1998	Went into effect July, 1999 and has been modified twice since. Uses mixed juries for some crimes

Sources: Correa (1999), CEJA (2005a), Langer (2007), and own modifications

Ironically, the larger and more advanced countries – Argentina, Brazil, Chile, and Mexico—have been the last to join. Brazil still has not adopted a new code, although like

[2] Although both organizations fall under the Supreme Court's organization, court interference with their operations has been remarkably minimal.

Mexico, it had made earlier changes which brought it into line with some of the codes' contents. Most notable here is the creation of an independent Public Ministry (prosecution), replacing the traditional instructional judge.

The Reform Recipe and Guiding Principles

These topics have been treated in far greater detail in other works (Binder and Obando, 2004; Correa, 1999; Davis and Lillo, 1996; Hammergren 1998a and b; 2003, 2007; Langer, 2004 and forthcoming; Popkin, 2000; Prillaman, 2000; Ungar, 2002) and thus are discussed only briefly here. That the region's criminal justice systems did not perform well was widely acknowledged in the early 1980s, although the same statement could be made about its justice systems in general. Similar problems were evident at both levels – corruption, inefficiency, politicization, and a general failure to provide satisfactory responses to claimants. Generally the underlying causes were also recognized – inadequately prepared and motivated staff (largely a consequence of political interference in appointment systems), insufficient material resources, outdated organizations, laws, and practices; and a general lack of transparency in operations. To this, however, the interested jurists added another element – the maintenance of an outdated criminal justice system based on inquisitorial principles which aggravated the potential for human rights abuses and manipulation of outcomes and served neither the defendant nor the aggrieved party well. While it is still not clear what the critics meant by an inquisitorial system (which at least in Europe had advanced farther with better results, Damaska, 1997; Jörg et al, 1995), the specific characteristics criticized were evident:

- Investigation of criminal acts by an instructional judge whose findings, collected in a written report (*expediente*) became the basis for decisions taken during the trial phase.
- An excessive dependence on written documents, which often became the sole basis on which verdicts were derived.
- The elimination or very perfunctory use of oral hearings so that a defendant might never actually see the trial judge or judges
- A tendency for the instructional judge to also serve as the trial judge, thereby leaving no room for alternative interpretations of the facts and legal implications.
- Failure to provide adequate defense for those charged with crimes, no chance for the victim to participate in the decisions, reliance on confessions (often forced) as opposed to "more scientific evidence," and the extensive use of pre-trial detention, sometimes for periods exceeding the length of the likely sentence.

The shift to an accusatory system was promoted as a way of eliminating these vices by:

- Giving control of the investigation (and the police's activities) to an independent prosecutor and also providing a defense attorney who could develop his or her own investigation and so present an alternative interpretation of the facts and legal issues
- Supervision of the investigative stage by an independent judge responsible for ensuring the defendant's rights were respected. In a series of brief oral hearings this judge would decide whether searches, seizures, or pre-trial detention would proceed and would also determine whether the case would go forward to trial.

- Presentation of the two sides of the case to a judge or panel of judges with no prior knowledge of the events. This would be done in a public, oral hearing with a reliance on oral testimony rather than written reports.

These were the basic requirements for the new model, featuring the principles of a respect for due process rights, a contradictory proceeding with an equal role for the defense, immediacy, transparency, and "orality." More sophisticated versions also incorporated a role for the victim or others affected by the crime, the potential for an abbreviated process based on the defendant's acceptance of responsibility for the alleged acts, and the introduction of mediation and restitution for minor crimes – where the defendant might compensate the victim for losses as well as participating in a program of community service, education, or the like. In the interests of a more democratic, transparent process some new codes added juries, composed of citizens or of citizens and judges (*jurado escabinado*). Although USAID supporters often supposed the model was based on the U.S. accusatory system, those most active in drafting the codes were more likely to draw on the German and other European experience – as seen in the insistence that the judges overseeing the investigation not be involved in the trial phase, a rejection of U.S. style plea-bargaining, the mixed juries, and the emphasis on reconciliatory and restorative justice.

As shown in Table I, while the movement began in the early 1980s, most countries did not enact the new codes until well into the next decade. Once the ball got rolling, the momentum increased rapidly, and back-sliding (redrafting of codes to eliminate some "soft-on-criminals" components) has been rare. Much of the current impetus benefits from a region-wide concern with rising crime rates, and the promise that the codes would be more effective in addressing them as well as treating the defendants more fairly. It bears noting that the codes were not drafted to this second, but increasingly important end, and thus that the evidence for their ability to promote it is not as well established. In fact, if one compares the performance of the code-adopters with common law neighbors at similar levels of development, crime rates do not look that different. The following table, for example, shows comparative statistics on the Dominican Republic and Jamaica as one example of the contrast. Jamaica's lower ratio of judges and prosecutors to population might appear significant, but it coincides with English practices, and moreover there are signs that the Dominican Republic's court officers are used far less efficiently.

Table 2: Comparative statistics on criminal justice systems, 2004-2005

Country	Population 2004	No. Police Per 100,000	No. Judges Per 100,000	Prosecutors Per 100,000	Homicides Per 100,000
Dominican Republic	8.77 million	26,427 301	610 7.0	705 8.0	27.4
Jamaica	2.64 million	7,200 273	84 3.2	83 3.1	63

Source: World Bank, 2007.

As the experts are increasingly willing to admit, it remains unclear as to what factors determine crime rates and what role the usual reform measures have in affecting them.

> There is no silver bullet that will reduce crime, much less eliminate it…[N]o one can satisfactorily explain changes in crime rates….[3]

Nonetheless, it has by now become received wisdom in Latin America that a "modern" code is essential for its own sake and to demonstrate resolve in attacking crime.

The new codes and related legislation (governing the creation or reorganization of key agencies like public defense, public prosecution, the police, and of course, the courts) were inevitably the first step in the programs, but they were followed by other significant changes. Countries that did not have public prosecutors or defenders had to create them; and those that did had to reorganize and upgrade them to take on new tasks. Budgets had to be increased accordingly and more professionals and staff hired. The insistence on separating supervisory (called *jueces de garantia*) from trial judges often required adding positions or at the very least determining who would play which role. Although few countries undertook police reforms, police were usually provided with training and in some cases, programs were introduced to improve their coordination with the prosecutors. Training in fact was a common element as preparation for the code's entrance into effect, directed at judges, prosecutors, defenders, police, and sometimes the private bar and general public.

Early experience with code implementation (and especially that of Guatemala in 1994) quickly demonstrated the need for better design of implementation plans. Guatemala had virtually done nothing to prepare for the change, but its own disastrous first months were a convincing lesson to those that followed. Late-comers have often opted for staggering implementation, either by region or by date of filing of cases. In this latter instance, cases entered before the code went into effect would continue under the old procedures, and as the backlog decreased, judges would gradually be shifted to the new system. In the regional scheme, adopted by Chile, Colombia and Peru, the goal is a gradual phase-in, often starting with smaller judicial districts.

Until CEJA (Centro de Estudios de la Justicia de las Américas) began to do evaluations in 2001, there was little systematic information on the results of the change. Moreover, in its first efforts, CEJA was more inclined to track the implementation of the new model – counting the number of oral trials and the level of participation in each – than to review what might be called the critical impacts (Baytelman, 2002; Riego 2002; Rivas, 2002). The latter might include changes in: speed of processing of investigations and trials; clearance and conviction rates; percentage of unsentenced detainees and average time in detention; average costs per incident processed; and differences in each according to the type of crime involved. The latter is especially important given the widespread criticisms of the prior system's inability to deal with more serious crimes and the excessively long time it might take to process less serious ones, especially those with pre-trial detainees.

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[3] Wilson (2004; 537-538). He expands on this point (pp. 546-547): "No one, so far as I am aware, has ever explained a nation's crime rate by taking systematically into account all of the variables that might affect it. (Unfortunately, this inability has not prevented some scholars from confidently explaining to journalists why the crime rate has gone up or gone down.) Moreover it is no simple matter to drive down crime rates by relying more on imprisonment. Doing that requires changing the effectiveness of policing, altering the behaviour of prosecutors and judges, and coping with the costs, tangible and intangible, of having a large prison population. The same problems confront efforts to reduce the crime rate by means of prevention, employment, and rehabilitation programs. We are getting better at evaluating such efforts and drawing lessons from them, but we have no idea what would be the cumulative effect of putting in place all of the best programs on a large scale."

CEJA has since attempted to deal with at least some of these outcome and impact variables, although it is hindered by the persisting lack of good statistics, not to mention baseline data (Vargas, 2005). When no one knows what the status quo ante was, it is impossible to determine what has improved. Poor statistics are indicative of a larger problem and one with more serious consequences for the reform efforts. This is the tradition of poor management within all the sector organizations, which makes it difficult to introduce any changes to business as usual, as well as the corrupt, politicized practices which too often provide the real explanation for what occurs within each organization. I will return to this later, as one of the strategic oversights of the reform movement.

The new codes have thus changed the shape of the criminal justice system and the procedures that govern its operations. Whether these changes constitute an improvement is another question. The answers doubtless vary by country – Chile, not unexpectedly, seems to be producing improvements in many of the target outcomes (Vargas, 2005). In Ecuador, Guatemala, and Paraguay, the bottom line is less clear, but the process is not ended and the greater attention to the misfunctioning of the new system may in fact force further change. I do not want to suggest that the code reforms were pointless, but only that the strategy behind them was incomplete, and that in addition to allowing more time, attention will have to be paid in a more concerted fashion to what was ignored on the first round. The reformers placed excessive faith in their ability to induce behavioral change through new laws and a little training; they ignored the serious structural impediments to the reforms they planned. They may have done this consciously, in recognition of their inability to make any dent in the underlying structures, but as it has turned out, those structures to a greater or lesser extent have undermined their larger purpose. The next section thus explores some of those problems and the means through which they might be more directly addressed.

What Was Not Done and Now Needs to Be Put on the Agenda

I have title this paper "observations" because it is not based on systematic research, but rather on what I have witnessed over twenty years of watching and participating in the code reform process. During that time my own position has changed, from convinced backer of the code reform movement, to a more critical view of what was needed and what could be accomplished by this strategy. Code reform will not go away, and I am not suggesting it should. It may have been the quickest way to shake up a thoroughly rotten system, but shaking up is not the same as improving. If the code reforms are to work, they need some rapid readjustments, to the codes themselves and to the actions taken to put them into effect.

If popularity and widespread adoption are the measures of success, then code-induced criminal justice reform has been a highly successful strategy. However, if success must be measured against improvements in outputs and impacts, it is more debatable. In some sense, the very elements accounting for the strategy's popularity also explain its failures: it provided a simple explanation of the problems and the remedies; it did not dwell on some of the sector's dirty secrets (corruption, politicization, poorly qualified staff); it appeared to be a cheap remedy; and it promised quick returns for fairly straightforward interventions (enact the code and put it into effect). Unfortunately, the problems were not so simple; the dirty secrets lay behind many of them; the costs were higher than expected and still increasing; and the timeframe was vastly underestimated. Even in countries like Chile,

with less dirty laundry to hide, things are taking longer than expected, costing more, and there are many little details the codes overlooked.

Experience with the criminal code reforms, and with other legally-based strategies has by now convinced most practitioners that new laws in and of themselves produce little change, and that what change they do produce may not be in the desired direction (Gupta et al., 2002). To the extent new laws force system actors to behave differently, those affected may simply find new ways to engage in old vices.[4] Although this lesson still needs greater emphasis – even today the reductionist legal approach occasionally reemerges[5] – I do not want to dwell on this point. Instead, the following focuses on what the experience with the criminal code reforms suggests about how to improve code-induced change in general and in the criminal justice arena in particular. The discussion is organized around a series of questions, but transcends the simple "yes" or "no" answers to include some guidance as to how to overcome the obstacles identified.

Can New Codes Work with Unreformed Organizations? The code reformers clearly knew they were working with imperfect organizations, but they seemingly were willing to run this risk rather than trying to reform the organizations first. This more cautious initial step might have put off their own reforms for years, and, admittedly, been too hard to accomplish. The codes' proponents apparently hoped that the enthusiasm about the new accusatory system would induce some sort of reform from the bottom-up, or at least make top-down reform more feasible at a later time. This approach is not unique to code reform, or to justice. Judicial reforms have also used a reductionist recipe featuring training, automation or higher salaries, and reforms in other sector often appear to adopt the same logic. In fact many of the post-Washington Consensus "second generation" reforms aimed at improving public sector management also started with an assumption that new laws and structures would produce better outcomes. Time has demonstrated here as well that the reformers' assumptions were overly simplistic (World Bank, 2006).

It is generally a wise idea to work first on what one can affect. The problems begin when the window of opportunity is taken to be the only necessary intervention. The point is to use the window to induce other changes, not to assume they will happen on their own. Often more direct action will also be needed. A corrupt, politically manipulated judiciary, prosecution, or police will sooner or later require its own internal reforms because of its ability to undermine the new procedures. The worse the initial situation, the more urgent these reforms become. Where the problems are less systemic or less structured in, closer monitoring and targeted attention to areas of vulnerability may be sufficient for a while.

Thus, following a partial police reform, Panama focused more attention on improving coordination between police and investigators as this appeared to be a source of many problems. In Chile, the observable tendency to avoid the simplified, alternative procedures brought efforts to educate judges, defenders and prosecutors in their use. In Paraguay,

[4] During Guatemala's first oral trial under the new procedural code, local observers contend that the parties attempted to bribe nearly all the actors (judges, prosecutors, defense, and witnesses), and may have succeeded for the most part. A foreign prosecutor, with considerable experience in Guatemala and who was following the trial closely, observed to me that while the defendant may have been guilty, the evidence presented hardly justified that verdict. One additional example taken from another type of judicial reform is the repoliticization of the judicial councils introduced to improve and depoliticize the judicial selection process (Hammergren, 2002)

[5] For example, I was just contacted by staff of a sister organization proposing a law-based reform to improve economic transactions in a country known for its corrupt, dependent, and extremely inefficient court system.

when it appeared that one major bottleneck was in the *jueces de garantías'* handling of the indictment (decision to send to trial), a second type of judge was added for this stage. Unfortunately, similar bottlenecks appear to inhibit their efficacy, most likely because the problems originate in certain shortcomings common to all judges in that country However, in Haiti, even the code advocates have pulled in their horns, noting that substantial organizational reforms really are a necessary first step. El Salvador's early police reform, while effected on a separate track (and for related, but different reasons), clearly helped that country's progress in introducing the new criminal justice system. However, weaknesses and vices in both public prosecution and defense continue to hamper change and may require more than a few readjustments.

Countries which have not conducted police reforms (e.g. Paraguay, the Dominican Republic) frequently encounter many obstacles ranging from the difficulties of coordinating police investigations with the work of the prosecutors to the low quality of the police's input as well continuing problems of corruption and abusive treatment of suspects and ordinary citizens. However, where police reform is needed it is usually not the only type of reform required, and unfortunately, even when advances are made with one institution, failure to attend to the others can both undermine the impact of the first reform and even lead to backsliding. Short of a decision like that taken in Haiti, the only other recourse for countries with major organizational dysfunctionalities, may be to advance organizational and procedural reforms simultaneously. This is not a recommendation to be taken lightly, and there are no successful examples in the region. Given that most already have their new codes, they may simply be facing an incremental process of multiple organizational reforms, trying not to get too far ahead in any single organization and thus run the risk of undermining initial successes with the poor performance of those still awaiting improvements.

In the best of worlds, it should be obvious which organizations require the first attention. This is very likely to be the police although as discussed below, there are some very serious obstacles here. Still ex-post evaluators of the police reform attempted in Haiti in the mid 1990s also contend that the relative lack of attention to the judiciary, prosecutors, and prisons was a major contributor to the eventual collapse of the police reform itself. To make the challenge look somewhat less daunting, two factors might be kept in mind: first, none of the other organizational reforms is likely to be as financially and politically costly as that of the police,[6] and second, the short and medium term goal in all of these reforms is not perfection, but rather sufficient changes to the organization to eliminate the major vices affecting its part in the criminal justice process. Some of these changes may have to be systemic – especially those relating to improving and depoliticizing selection, evaluation, monitoring, and disciplinary systems, but others can focus on sections of each organization or functions must critical to implementing the new processes. The aim of improving results rather than seeking perfection needs to be stressed repeatedly. The unfortunate tendency of many regional reformers once they focus on organizational change is to attempt too much, once again designing perfect laws that will not be implemented, rather than targeting areas with a potentially quick impacts on results. Absent the kind of funding donors put into remaking El Salvador's police force (or are now putting into their second stab at Haiti), these reforms will have to be incremental. It never hurts to have an idea of where one

[6] Costs are higher because police forces are larger than the other organizations, tend to have the worst paid staff, and require even more equipment and infrastructure. Political costs are discussed in the next section on the structural impediments to change.

wants to end up, but too much time and resources are often expended on debating the ideal model as opposed to getting to work.[7]

Can Codes Work Without Addressing the Structural Basis for Existing Vices: This is really a continuation of the above point, but is important enough to merit separate discussion. As others (Khan, 2006) have noted, corruption and other vices are more than a question of bad people taking advantage of opportunities. They often are a consequence of more systemic forces and for this reason are especially hard to eliminate.[8] Take the case of corrupt, ineffectual, sometimes criminal police forces. In several countries (Brazil, Argentina, the Dominican Republic) researchers now claim that police corruption is a vital source of funding for political war chests. Politicians, and especially those at the local level, depend on police bribes to finance their own campaigns. In countries, or districts, where this practice is prevalent, efforts to reform the police often founder on this simple fact. It is claimed that this has stymied reform efforts in Buenos Aires Province in Argentina, Rio de Janeiro (***Washington Post,*** May 24, 2007, p. 14), and the Dominican Republic. Moreover, should politicians attempt to break the dependency, the police often have sufficient information on their past malfeasance to threaten their reformed collaborators. Even in Costa Rica, a country not noted for corruption, the author's interviews in the 1990s indicated that any effort to reorganize the investigative police, nominally under the Supreme Court's control, were impeded by the fact that the police had dossiers on all the justices. Whether true or not, the anecdote is indicative of the larger problem.

Political control of judges and prosecutors had been a longstanding complaint about the region's justice systems. In many countries there were simultaneous efforts to eliminate it by introducing new selection mechanisms and career systems. While not connected to the criminal justice reforms, these additional measures would have eliminated some obstacles to their implementation. Unfortunately, the changes were never accomplished in some countries and in others were rapidly undermined. Moreover, in recent years, many countries have seen a renewed effort to assert political control over the courts. This often involves irregular purges of the supreme court and occasionally the entire bench. While done in the name of combating corruption, this is usually only a pretext. Examples include Alberto Fujimori's purge of much of the Peruvian bench following his 1992 auto-coup; Hugo Chavez's similar actions in Venezuela in the early 2000s; President Carlos Menem's stacking of the Argentine Supreme Court and federal criminal bench in the early 1990s and President Nestor Kirchner's subsequent forced removal of Menem's justices and reorganization of the Judicial Council, responsible for selecting judges; Nicanor Duarte's removal of most of Paraguay's supreme court in 1993; and Evo Morales' ouster of four Bolivian justices and much along the line of his mentor, Hugo Chavez, a continuing attack on the remaining members and on the Constitutional Court. The move only backfired for Luis Gutiérrez of Ecuador when after his removal of two supreme courts, he was forced out of office himself.

Interference with the public prosecutors is often easier because they are frequently part of the executive and serve at the pleasure of the president. Menem effectively neutralized this

[7] Concerned NGOs for example spent several years designing a new police law for the Dominican Repubic, but at the time of its passage (2005) still had no implementation plan nor even an idea of the required budgetary resources. Not surprisingly, the law has had little impact.

[8] For a discussion of how the political environment and the rules of the "political game" have affected police reform in Argentina and Brazil, see Hinton (2006).

agency throughout the 1990s by placing one of his followers at its head. As with his appointees to the federal criminal bench, it was said his motive was to fend off legal actions against him and his allies for alleged acts of corruption. In Paraguay, the head prosecutor is named and removed by the president. His professional staff is appointed by a notoriously corrupt Judicial Council; he does not even control their placement within the agency. Moreover, as with the judges, in the absence of career status, Paraguayan prosecutors can be removed by a separate Disciplinary Board, the members of which are largely politicians and are reputed to pressure judges and prosecutors to act in accordance with board members' wishes. Similar conditions prevail in the Dominican Republic except that it is the executive who names the district attorneys, and under the prior administration of Hipólito Mejía, made some truly inappropriate choices. Following the creation of an ad hoc judicial council to select members of the Dominican supreme court and the court's implementation of a mechanism to recompete all judgeships, judicial performance in that country seemed to improve, but in recent years there have been indications of repoliticization and a rash of irregular decisions on corruption cases in particular.

In theory, this reassertion of political control might not constitute a major obstacle to successful code implementation. As in an extra-regional example, Singapore, the executive might use its powers very selectively, intervening only in cases of direct interest to a few high level politicians, and otherwise insisting on "clean" and efficient justice. In fact, however, the usual result has been far more extensive intervention and a proliferation of free-lance corruption in cases where the powerful have no stake. Where judges know their permanence and promotions do not depend on honest and efficient performance, they become vulnerable to a variety of pressures. In this situation, it matters little who is nominally in charge of overseeing them, a council or the court, as neither one is likely to have the capacity or the will to carry out that job. Moreover, as the new codes depend on several actor carrying out their functions in concert (the police, the prosecutors, several types of judges, and the defense), there are any number of places where things can go wrong. For example, in Argentina, the selection of a new and more qualified head prosecutor and anti-corruption prosecutor has had less impact than expected because the instructional judges (who have the final say as to who does the investigation – themselves or the prosecutors) are still the Menem appointees. Code reformers might argue that the underlying problem is the failure to adopt a fully accusatory system (and thus eliminate these judges), but the more basic flaw is the politicization of a critical link in the criminal chain. Paraguay, with a fully accusatory code, has a similar problem with its new "intermediate judges," who appear to connive actively with those wishing to delay a criminal proceeding until the right to action expires.

The larger point is that criminal justice systems are situated in a larger political environment and thus are not immune to the latter's vices. If powerful actors could not stop the passage of the new code, or failed to do so out of inattention, they still can impede its broader effects through their influence on the participating organizations. They may do this for reasons quite alien to their concerns about the code – because it is in their interest to control these organizations to other ends, as a source of funding for private or professional purposes, as a place for patronage appointments, or to limit the third branch's ability to interfere with their policies and programs. Unfortunately, the impacts of this intervention are not so limited and extend to broader aspects of organizational performance, including those in criminal justice. There are signs that growing public concerns about the state's inability to curb violent criminality may finally force a change,

but until that happens, the most potent obstacle to the necessary institutional reforms will continue to be the powerful interests vested in keeping these organizations under the politicians' collective thumb.

Have the Codes Gone Overboard on their Due Process Guarantees? This is a common, early criticism of the codes ("designed for Switzerland, not for our country") and one which is some cases (e.g. El Salvador) produced revisions designed to make them less "soft on crime." The code drafters were motivated by a concern for the prior system's negative impact on basic human rights, and especially in cases against political agitators or the poor. At the time the codes were written (beginning in the 1960s), the prototypical crime in the region was of a traditional sort – robbery, theft, homicide, or human rights violations themselves. Organized crime, gangs, drug trafficking, and white collar crimes in general had not emerged to any prominence. (Corruption, of course existed, but possibly because it was so rarely prosecuted, did not seem to attract the drafters' attention.) Hence, the code drafters' concern for the abusive treatment of the often marginalized (and frequently, innocent) defendant is understandable, as is their focus on incorporating measures to counter these practices. Where a majority of defendants were themselves victims of the system, the aim was to ensure them adequate protections.

What little was said about investigation was also motivated by this vision – elimination of the confession as the 'queen of proofs," an emphasis on scientific evidence (although in fact, most modern investigations still rely extensively on interviews and testimony, and with the exception of DNA, many types of modern evidence – fingerprints, ballistics, hair and fiber samples -- are now questioned for their reliability), prosecutorial supervision of the police (to the extent of nearly giving the investigation to the former); setting of limits on how long the investigation could take; at one point (now thankfully eliminated) the stipulation that those under investigation be informed early in the process; and the creation of a separate category of judges to oversee investigations and so protect defendant rights. With the exception of the rigid time limits (on both investigation and the duration of the entire process to sentencing) most of these provisions were not in themselves harmful. As adopted in fact, they have created their own problems.

As a consequence of the interpretation of the codes, and possibly the code drafters own misunderstandings, the prosecutorial supervision of the police has often become counterproductive. Early on in El Salvador, the prosecutors proposed that they be given guns and fingerprinting equipment so they could do the investigation themselves. As a possible carryover from the prior system (when this role was played by the investigative judge), it is frequently understood that unless the prosecutor is physically present when evidence is collected, the evidence has lesser value. Police testimony is frequently discounted – perhaps, realistically in light of the problems with that institution, but in contrast to the Commonwealth reliance on police prosecution until well into the 1980s. The more conventional modern division of labor – where the police investigate and the prosecutors use the results, periodically making requests to strengthen their own case theory – seems to have fallen by the wayside, if it was ever considered. Relations between the police and prosecutors are always problematic; under the new codes in Latin America this has often led to the suggestion that the prosecutors get their own investigators or that the investigative police be relocated in their organization. If resources permit, this could be helpful, but it overlooks one simple fact – the ordinary police are still most likely to reach a crime scene first and in many areas may be the fundamental source of evidence. Hence the prosecutors and their own investigators will have to learn to work with them. Giving the

prosecutors their own investigators is not necessarily harmful; putting all the investigators within their organization is probably not a good idea. It is inherently less efficient, further separates both the investigation and prosecution from the administrative police,[9] and can, as has happened in several Latin American countries (Mexico, Panama under Noriega), lead to capture of the prosecutors by a corrupt police force.

Many of the negative impacts on the police-prosecutorial relationship can be blamed on the code drafters' lack of familiarity with how investigation is conducted, in any modern setting and under European or Anglo-American accusatory systems. Here the emphasis on due process rights was simply not accompanied by an equal emphasis on the needs of the investigative teams. These needs conceivably could be addressed without further changes to the codes – they largely require concerted attention to improving within- and inter-organizational practices and more emphasis on results. Further law drafting might in fact be counterproductive, placing still more focus on the rules and their interpretation, rather than on what organizations are supposed to achieve. Once organizations have identified problems and solutions, they can then make any legal changes that are absolutely necessary.

A second problem arises in the abuse of the due process rights by the new types of criminals, most of whom can afford legal representation capable of using the guarantees to avoid justice. As noted, the code drafters were mesmerized by a traditional form of injustice – the unrepresented, poor defendant whose rights were either not recognized or systematically trampled by government agents. The new codes gave him a lawyer and some rights. To those with the money to hire an army of attorneys it gave much more. The result is a well recognized problem in investigating and prosecuting modern types of crime.

The most usual strategy here is for the defendant's lawyers to use the ample opportunity to question every step in the pre-trial process, and enter interlocutory appeals, up to the supreme court if need be, when the initial decisions go against them. They thus frequently turn the hearings held by *jueces de garantías* into mini-trials, taking advantages of those officials' lack of understanding of their own responsibilities (a quick decision on whether pre-trial detention or a search is in order), their fear of a complaint being registered with whoever oversees their performance, and their likely susceptibility to bribes. These tactics when effected in a system posing strict limitations on the length of investigations or of the overall process, can simply string out preliminary activities until the prosecutor loses the right to take the case forward. This is not, it should be stressed a problem of statutes of limitations (although these are arguably also too short) but rather of a separte set of deadlines introduced in most new codes to avoid excessive delay. Since the time limits tend to be similar for all types of cases, they usually are far too long for simple ones, and far too short for the more complex.

If this tactic doesn't work, the lawyer can repeat it in the trial phase, enter multiple interlocutory and final appeals, introduce a parallel *amparo* or *tutela* (in systems like those of Mexico and Colombia which allow these constitutional protests against judgments), or

[9] In Brazil, this separation is structured in at the state level, and is the source of many problems. Investigations begun by the administrative police (Polícia Militar), must be processed by the investigative police (Polícia Civil) and then sent to the prosecutors, with various delays along the way. There are consequently on-going discussions about unifying the two police forces, but so far little progress in that direction.

seek other special rights for his or her client (reduced sentences for older defendants, special prison facilities for white collar convicts, etc). In an on-going case against Paulo Maluf, a former governor of São Paulo state in Brazil, it is estimated that the defendant, with multiple charges of corruption against him, will never spend any time in prison beyond the few weeks of pre-trial detention he initially suffered. (He was released because of his age and health). This is not a unique case – there are many others that could be cited, including the Peruvian Constitutional Courts' overturning of one verdict against Abimael Guzman, the head of the terrorist organization, *Sendero Luminoso*. (Mr. Guzman remains in prison because of the several other guilty verdicts.)

In many of these cases, corrupt judges and prosecutors probably played their part, but in others, courts are simply deciding on the basis of the new laws, as interpreted by the judges or aggressive defense attorneys. There are doubtless some modifications that should be made to the codes (e.g. the deadlines), but the underlying problem is not that they are overly protective of rights. Instead it is a combination of what the codes overlooked (the needs of investigation) and how they have been applied in an environment full of its own perverse incentives and unreformed organizations and actors. The larger need is thus not for more code writing, but for a concerted attention to what is not working and to finding ways to fix it. That many proceedings are delayed by the tendency of *jueces de garantias* (and in Paraguay the *jueces de la etapa intermedia*) to turn their hearings into mini-trials can be blamed on a mixture of three elements:

- The judges' own failure to understand what their role is, and thus to extrapolate from the more familiar trial process.
- The prosecutors' own uncertainty as to how they should approach these hearings, and their tendency to arrive with more information than is needed – a fully documented *expediente.*
- Private defense attorneys' ability to take advantage of these uncertainties to create delays, sometimes adding a bribe to ensure their success.

Yes, the problems could be addressed by rewriting the relevant sections of the code, but as with the sometimes tortured police-prosecutorial relationship, it would arguably be more practical (and less risky in terms of adding still more grounds for misunderstanding) for organizational leaders to reach agreements on standards and to educate their subordinates in them. This poses fewer problems for prosecutors and police than for judges, but the solutions will only work if endorsed by all organizational actors. A respect for judicial independence theoretically restricts high level judges from ordering those at a low level how to apply the law. This still leaves the way open for creating guidelines via *intructivas* and *acordados* and enforcing their application through high court jurisprudence.[10] Inasmuch as this is a region-wide problem, the remedies might be introduced and discussed on a regional basis. This would allow courts less likely to find or apply them on their own to seek support from their counterparts in other countries. In short, the same methods used to promote adoptions of the codes can also be used to deal with their shortcomings.

A simultaneous effort to eliminate some of the special treatment accorded to political and other elites would also be helpful, if provoking still more resistance and requiring legal and

[10] Most high courts in the region have the ability to issue general guidance (called *instructivas* or *acordados*), but the extent to which it must be followed by lower level judges varies considerably in law and in fact. If legally challenged, however, the high court may then be able to reinforce its impact via its decision in a concrete case.

possibly constitutional change. Most of this is not a result of the codes, but rather of privileges corresponding to earlier times. (See Hinton on Brazil, for example). Countries have begun to make strides in reducing various types of political immunities, but here too more could be done (Barreto and Kessler, 2005). As Hinton and others note, at least a part of the public's impression that justice in not meted out is based on fact, and thus if the codes and the rest of the criminal justice reforms are to achieve their objective of a more transparent, equitable process, these holdovers from another age will need their own reforms. Due process also should mean the same due process for all, and here the special privileges lie in overt contradiction to that principle.

Is There too Much Emphasis on Orality? If the code reforms can be criticized as a reductionist approach, the reductionism has been taken still further with the emphasis on orality as the key to improvement. A characteristic of the new proceedings once seen as a major impediment to their adoption (because it was assumed lawyers would resist having to develop new skills) has now become its principal selling point – to the extent that second-generation proponents (those in the adopting countries) frequently summarize the changes as the "oralization" of the process and the elimination of all written records. This characterization would come as a surprise to officials working in accusatory systems – when a U.S federal judge heard Mexican judges describe it in this fashion, she noted that a good part of her work still involves reading and writing, often lengthy documents. How discovery would work without written records or how investigations would be documented without them is also a good question. Moreover, the apparent expectation that judges can make fair decisions solely on the basis of what they hear in court, without being able to study reports that experts may summarize or do their own review of the relevant laws and jurisprudence seems overly simplistic. The elimination of the case file (*expediente*) as the sole source of judicial pondering is one thing; the notion that judges will just listen and decide on the spot is another.

There are several additional problems associated with this emphasis and a possibly incomplete understanding of how orality is used in mature accusatory systems. The virtues of orality in increasing transparency and immediacy (the judges' direct contact with the witnesses and defendant) are frequently stressed.[11] Its third positive contribution – in promoting consolidation of decisions, not only in the trial, but also in preliminary hearings – is more often forgotten, as is the potential for reducing its impact by allowing an excess of continuances and adjournments or simply too many preliminary meetings. Orality can also produce delays if court staff do not exercise discipline over lawyers attempting to create them. There has arguably been too little attention to the oral hearings held prior to a trial and to the purposes they should serve. This may in part explain the tendency for these hearings to turn into mini-trials inasmuch as what training has been provided tends to focus on the trial stage. Where this is the only model judges, prosecutors, and defenders have they can hardly be blamed for extrapolating it to situations where it is less appropriate.

A final problem arises in the role of the full oral trial as used in the various types of pure or mixed accusatory systems. As is well known, in the United States few cases go to trial, and most are decided through the defendant's acceptance of responsibility for at least some of the charges (plea bargaining) and a verdict and sentence based on that admission. In the mixed European systems, more cases are "tried," but the trials tend to be less conflictual and briefer, often focusing less on disputes over the facts than on the defendant's motives

[11] However, this does appear to be inconsistent with a recent fascination with video-conferenced trials, not exactly a means maximizing transparency and immediacy.

and level of responsibility as a means for arriving at a sentence.[12] It is still not clear in which direction the new Latin American systems are heading, but if they pick the U.S. model, they will have to find some way to encourage use of the alternative, shortened proceedings or they will soon encounter gridlock. This has not been a problem as yet because of delays in the investigative and preparatory stages and thus the lower number of cases that have come to trial. However, once these delays are reduced, as they must be if the system is to succeed, the more basic decisions will be critical. Also, the choice of model should be reflected in the trial and pre-trial training given to court officials. Using U.S. judges, prosecutors, and defenders to train their Latin American counterparts makes little sense if the chosen model is closer to the European variant. Likewise, European trainers would be inappropriate in countries opting for the U.S. version. Leaving the decision to the trainers is not very wise, as most of them seem unaware that their system may not be the one the individual country has adopted.

In short, orality and especially the oral trial have doubtless been overemphasized, with too little attention to 1) the purposes and conduct of pre-trial oral hearings; 2) the trade-off between full oral trials and abbreviated proceedings and the way the latter will be conducted and used; and 3) the different skills, content, and purposes involved in oral trials depending on the accusatory model selected. Even under the European systems, and certainly in the U.S., the quality of the system's overall outputs depends on what happens before or in lieu of the trial and much that happens in those early stages remains fairly nontransparent. Thus, whether out of a concern for due process guarantees or the system's efficacy in bringing the guilty to justice, the pre-trial stages merit far more attention. Contrary to the focus of CEJA's first evaluations, the test of the new proceedings is not the quality of the oral trials, but rather how cases are processed all along the way.

Have the Codes Encouraged Bureaucratization? Excessive bureaucratization (sometimes called "legalism" or "formalism") was another frequent criticism of the prior "inquisitorial" system. What was meant was a tendency for judges to overemphasize rules and procedures while paying less attention to the outcomes or results of their decisions. The codes did not specifically address this problem and in some sense, by splitting responsibilities among so many actors, may have aggravated it. The criminal chain now has many more parts, and arguably may diminish the identification of the individual organizational actors with the final outcome. One symptom of this is the difficult relationship between prosecutors and police, as discussed above. Persisting problems of coordination combined with uncertainties and debates as to the new organizational roles have created delays in processing cases and also encouraged a tendency to an "I'm doing my part; it's the others that are to blame for problems" outlook. Early on, El Salvador, adopted two interesting mechanisms to counter these developments: the creation of a multi-institutional committee to oversee reform implementation and the holding of workshops where front-line officials discussed common bottlenecks and sought remedies. The latter is particularly useful as a source of information from those most directly involved in working with the new procedures. Higher level meetings can help, but participants are frequently less aware of what is going on in the street or the trial courts.

The new codes may also be aggravating the problems within organizations on two levels. The first derives from the failure to reengineer work practices and internal structures in line with the new responsibilities. With the exception of the courts, the implementation plans

[12] It has been reported, however, that at least in Germany, longer and more conflictual trials are becoming more common, at least for more complex cases.

rarely paid attention to these issues, and consequently, left staff much as they were before. Traditional weaknesses – a lack of teamwork and internal communication; a tendency to create internal fiefdoms, and an excess of managerial levels but little effective supervision – thus continue to obstruct getting the work done. The codes paid no attention to fixing these vices, nor was that their purpose. The problem was the utter failure to recognize that this had to be done, the lack of skills for accomplishing it, and the many interests vested in business as usual.

The second level refers to the restructurings the codes did mandate, especially as regards the creation of a series of judges with different roles in the processing of a case. Most commonly this means a *juez de grarantías* to oversee the investigation; a sentencing judge (or panel of judges), and a third, *juez de ejecución,* to handle the enforcement of the sentence. In Paraguay, as noted, there is currently, a fourth level, the *juez de la etapa intermedia*, who decides whether the case proceeds to trial. This is the German model, and aside from the consequent need for a greater number of judges, it appears to work well there. It does, however, involve a conscious trade-off between two values: the elimination of any prejudices trial judges might derive from prior knowledge of the case as opposed to the procedural economies deriving from their prior exposure, and possibly their ability to use that exposure to the ensure greater "justice." The choice is really created by assumptions about a judge's ability to maintain neutrality; under the common law system it appears to be a false dilemma, and judges don't recognize its necessity.

Without abandoning the general principle (that the judge making decisions on investigations should not try the case), the Chileans are already considering dropping the need for separate categories of judges – thus only ensuring that no judge tries cases in which he or she has intervened earlier. The main concern here appears to be the proliferation in judicial positions that the model requires and the difficulty of figuring out how many are needed in each category. For many other countries, the problems are more severe – arising on the one hand, in judges' tendency to fixate on and possibly exaggerate their individual roles while overlooking the larger objective, and on the other, in the multiplicity of veto points impeding the case going forward. In the first case, the Chilean solution, combined with better specification of each judge's responsibilities, would help. In the second, the issue is the problem of "corruptible" veto points – not only that judges can paralyze cases for inconsequential reasons, but also that they could be pressured to do so. This is visibly occurring in countries where judicial corruption remains a large and unresolved problem, but even in those where it is less so, the new codes, by breaking the process into so many pieces, may be feeding rather than supplanting a traditional bureaucratic approach to administering justice. In either case, the current situation bodes poorly for the codes' survival when citizens see "notorious" criminals being let off for what appear to be legal technicalities or judges' simple manipulation of the procedural rules.

No country entirely escapes these criticisms, but in mature accusatory or mixed procedural systems, they are far less frequent. The difference lies in the judges and the institutional context – and thus the reformers' decision to implant the codes even where the both factors showed substantial imperfections. The solution is not to abandon the codes, but to avoid that conclusion something will have to be done quickly. Even Chile's solution, a realistic turn for countries that cannot afford to double or triple their complement of judges, will not work without additional steps – a better specification of the judicial role at each stage of the proceedings, better performance monitoring, and a direct attack on the assembly line

culture. Judges, and other sector actors, must be convinced to see their actions as one step in advancing a common product, and thus identify with the product first.

Conclusions

Institutional change is never easy, and it is even less so when those promoting it do not understand that this is the task. Law revision is only part of the process. It often comes first because that may be the best way of announcing an intent to change and improve, and because, especially in the legal sector, it is expected. However, it is virtually never adequate on its own. The code reformers, all lawyers and many without much practical experience, either did not understand this or calculated that the rest would evolve automatically. Their experience demonstrates the error of this assumption. The codes themselves contain errors that need to be corrected. However, the larger task is reforming the organizations and organization actors that must apply them. Here more new laws may be less important and even counterproductive without several additional elements.

- A better understanding of what is going wrong and why
- A concerted effort to remove the institutional constraints on all the improved outcomes (and not simply those related to due process guarantees)
- A greater attention to internal practices and structures to ensure they are aligned to allow actors to carry out their new roles
- A vision that goes beyond what each actor or organization does to a focus on the final results – justice delivered in a timely, fair, and nonabusive fashion. Contrary to what one of the proponents avows – that the purpose of the codes is to reduce due process abuses – they have other equally important objectives and unless these are advanced as well, the codes' future is murky.

What Latin America's experience with its new criminal procedures codes demonstrates should be transferable to other regions attempting to reform their criminal justice system as well as to future reforms anywhere in other justice materials. It also may help reorient other unidimensional reform programs, for example those emphasizing technology, training, or court administration. All of these elements are useful; none is sufficient on its own.

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